

“Options to strengthen the misuse of market power law”

Discussion Paper

12th February 2016

Submission by Master Grocers Australia

“Options to strengthen the misuse of market power law”

A. Introduction

Master Grocers Australia (MGA) welcomes the opportunity to comment on the “Options to strengthen the Misuse of market power law.” (Options Paper) MGA would like to thank the Minister for Small Business, the Honorable Kelly O’ Dwyer MP, for the opportunity to comment on the Options Paper.

As a national industry organization MGA represents the interests of small businesses, particularly independent supermarkets, small liquor retailers and hardware outlets across Australia. MGA has been a keen advocate of the need for competition law reform over many years and has long sought amendments to the Competition and Consumer Act 2010 (CCA), in order to maintain the sustainability of Australian small independent businesses in the retail industry and provide for their growth. MGA appreciates the extent of the review of current Australian competition law and recognizes the massive and challenging undertaking by the Harper Review Panel (Harper Review), together with the support of the Treasury Department in the Australian Government. MGA welcomes the opportunity to comment on “Options to strengthen the misuse of market power law” and in particular proposed amendments to Section 46 of the CCA.

MGA thanks the Treasury Department of the Federal Government for providing the opportunity to comment on the Options Paper.

About MGA

MGA is a National Employer Industry Organization representing independent grocery and liquor stores in all States and Territories of Australia. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, employing 115,000 people and accounting for approximately \$15 billion in retail sales.

There are 2,700 branded independent grocery stores, trading under brand names such as, FoodWorks, Foodland, Friendly Grocers, SPAR, Supa IGA, IGA and IGA Express and with a further approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia, trading under names such as Cellarbrations, The Bottle O, Bottlemart, Duncans, Liquor Legends and Local Liquor, which are either single or multi-store owners. These stores are comparatively much smaller when juxtaposed against the larger supermarket chains such as Coles and Woolworths, which combined, represent approximately 75 per cent of the retail supermarket industry.

B. Executive Summary

1. MGA has been a proponent of competition law reform in Australia for many years. This enthusiasm for reform has been buoyed by the disparate growth of particular sectors within the retail industry which has also exacerbated the need for changes to the law in order to provide for a fair, competitive process that will stimulate economic growth. Whilst it is of particular relevance to MGA to see competition law changes that will benefit the supermarket retail industry, past litigation indicates that changes to Section 46 of the CCA would also be beneficial to many other industry sectors.
2. MGA vigorously supported the initiative of the Federal Government to instigate a “root and branch review” of the CCA in 2014 and welcomed the release of the Competition Policy Review Final Report in March 2015 (the Harper Review), undertaken by a panel comprising Professor Ian Harper, Ms. Su Mc Cluskey, Mr. Michael O’Brien and Mr. Peter Anderson (the Panel)
3. MGA commends the work of the Panel in producing the comprehensive recommendations contained in the Harper Review which are directed at reform of Australian competition laws. When the Harper Review was released MGA welcomed the following views made by the Panel, in particular that,

“The Panel considers that Section 46 is deficient in its current form. The ‘take advantage’ limb of Section 46 is not a useful test by which to distinguish competitive from anti- competitive unilateral conduct. The ‘purpose limb’ that prohibits conduct if it has the purpose of harming competitors , is misdirected as a matter of policy and out of step with equivalent international approaches.

The provision should be directed to conduct that has the purpose, or would have or be likely to have the effect, of substantially lessening of competition in a similar manner to the prohibitions in Sections 45, 47 and 50. The provision should also include legislative guidance directing courts and firms to weigh the procompetitive and anti- competitive impact of conduct.....

As with any change to the law amending section 46 will involve some uncertainty, but the proposal adopts the long standing expressions “substantial degree of power in the market and substantial lessening of competition.

Although uncertainty may lead to some cost, the panel considers this is outweighed by the benefit of a more effective prohibition on unilateral anti-competitive conduct.”¹

¹ The Panels View page 347 Competition Policy Review Final Report March 2015

4. MGA is firmly of the view that the current S. 46 is not fit for purpose and is no longer regarded as good public policy. The world of business has changed in Australia in the last decade to the point where there are a few larger businesses who hold positions of market dominance and an increased number of small to medium sized businesses that vie with each other for business. In itself this is the way competition should be but unfortunately our competition laws are no longer fit for the purpose and require amendment in order to provide for a level playing field. The competitive process is being threatened and unless it is changed this will lead to the domination by a powerful few and the annihilation of competitors.
5. It is not in the public interest to allow exclusionary conduct to continue because it freezes out competitors. In the best interests of good public policy, improving economic performance and productivity, increasing employment, stimulating innovation and investment, Section 46 must be changed in order to foster greater engagement by all businesses in the competitive process.
6. MGA supports the removal of the words, ‘take advantage’ from Section 46(1) of the CCA. The current law permits a business that has clearly taken advantage of a competitor not to have breached the law if the competitor could have taken the same action as the business that is in breach. The words “take advantage” must be removed as this would remedy a deficiency in the current Act and help to eliminate uncertainty and confusion.
7. The retention of the word, ‘purpose’ in the current section 46 is also onerous. Proving that the purpose of a business activity was to substantially lessen competition and is likely to harm the competitive process is very difficult. Many forms of anti-competitive conduct are under the current law allowed to continue because it is necessary to prove that the purpose of the anti-competitive conduct was specifically aimed at eliminating or damaging a competitor, MGA therefore supports the retention of the word purpose but that it is directed at protecting the competitive process.
8. MGA is strongly of the view that that new laws will prevent the continued occurrence of exclusionary conduct in the market such as land banking, bundling and anti-competitive price discrimination and any other conduct that stops, blocks or freezes a competitor out of business.
9. MGA appreciates that there is scepticism in respect to the efficacy of change to competition laws, but after a comprehensive assessment of the need for significant change, remains firmly of the view that there is a need to implement amendments to the current section 46 in order to eliminate uncertainty and provide an opportunity to stimulate our economy. MGA therefore supports changes to Section 46 (1) as recommended by the Panel and in this submission we have reviewed the options that have been presented in the Discussion Paper.

C. Discussion issues

10. It is noted that in order to fully appreciate the views of the various parties who have a vested interest in competition law reform Treasury has sought responses to a number of specific questions and has also proposed various options to the amendment of Section 46 (1) of the CCA as proposed by the Harper Review, including the option to leave S.46(1) as it currently stands in the statute or agree to the amendments to S. 46 as proposed by the Harper Review in its entirety. In this submission MGA has provided responses to a number of the questions asked by Treasury and will also provide reasons for our views as to why MGA recommends our chosen option.

Question 1

What are examples of business conduct that would be detrimental and economically damaging to competition as opposed to competitors that would be difficult to bring action against under the current provision?

11. MGA submits that in previous submissions we have demonstrated that the supermarket and liquor industry is dominated by a duopoly that has significant market power due to its sheer size and ability to engage in exclusionary conduct and therefore exert its strength to the point that it will eventually eliminate its rivals unless changes to competition laws are implemented..
12. There is demonstrable evidence of smaller rivals being damaged as a result of an exertion of market power by larger businesses². It is this superior and dominant control of the market³ that MGA submits is both detrimental and economically damaging and is increasingly jeopardising competition in the retail industry. Either, or both, of the two major retailers in Australia has at some stage in the last decade engaged in some form of exclusionary conduct and this will continue under the current law.
13. Examples of bigger retailers engaging in conduct such as building loss making stores and cross subsidising them until there is surrounding increased population growth. There are examples of suppliers being controlled and squeezed by the larger supermarkets and lower prices being introduced at the cost of other retailers being denied access to supplies. Price reductions on certain items that may seem beneficial to the consumers initially but are economically damaging when other prices are increased for other commodities in their stores. There is also the consequent effect on the suppliers of the goods. Over extensive periods of time the two large chains have been able to persuade farmers into contractual relationships where they have supplied exclusively to one retailer. It has only surfaced in the last few years that exertion had been placed on suppliers to enter into such

² Let's Have Fair Competition- Master Grocers Australia August 2013 pp 35-41

³ Accenture Australia -The Challenge to feed a growing nation, November 2010. Page 27

- contracts. Such activities must impact on the sustainability of the other less powerful retailers who are legally able to challenge such actions but the current law does not provide hope for a successful outcome.
14. Land banking is another example of detrimental and economically damaging activity. This has regularly happened in country towns where tracts of land have been purchased with the clear intention of preventing expansion of smaller stores. This, and other activities, that foster the growth of one dominant company in the market place distorts the market and stifles genuine competition.
 15. Section 46 in its current form is inadequate in protecting the competitive process. Judicial decisions demonstrate that it is extremely difficult to prove that a firm with a substantial degree of market power, that has the ability to engage in these activities, has taken advantage of its power in the market. Courts have consistently held that the law in its current form does not prevent a firm from flexing its market power muscle to the detriment of its weaker rivals⁴. Under the current law a powerful market participant is justified in exerting its strength and if the smaller (or any) competitor is not prevented from doing the same then the bigger rival is said not to have taken advantage of its market power. If the law in its current form is allowed to remain then the damaging economic fallout will continue and will lead to complete duopolistic power in the supermarket industry.
 16. MGA believes in and supports rigorous and robust competition and understands that all businesses, large and small have to compete vigorously on their merits to survive and prosper. However, that outcome can only be achieved by providing that exclusionary activities are disallowed if they substantially lessen competition.

Question 2.

What are examples of conduct that may be procompetitive that could be captured under the Harper panel's proposals?

17. At no time has MGA disagreed with the right of a business to grow on its merits. We recognise that all competition involves participants engaging in the need to be ruthless where necessary, as part of a combative, competitive process. Small businesses want to be part of that process. However, MGA is seeking that the competitive process for large or small businesses is fair at all times.
18. The proposed changes to the legislation by the Harper Panel will not mean that Wesfarmers or Woolworths could not continue to engage in competition by opening new stores or reducing their prices or adopting any other competitive measure that they believe is appropriate for their business growth. However, the legislative changes would mean that their actions, just like any other business, would be considered in the light of

⁴ ACCC v. Cement Australia (2013 FCA) 909

whether the larger competitor had the purpose or intent to use their strength that could effectively damage the competitive process and the rights of consumers.

19. The supermarket duopoly will undoubtedly wish to continue its growth and is entitled to do so but it is submitted that new laws, if implemented, are more likely to temper that growth because there would be a more competitive environment. The supermarket duopoly has a substantial degree of market power already but if it engages in cross subsidization, or land banking or building oversize supermarkets in towns that already have more than adequate food outlets, which have a purpose or are likely to have the effect of lessening competition, then the proposed law is far more likely to enable these exclusionary practices to be considered as anti-competitive.
20. Proponents of leaving the current law as it currently stands are well aware of the plethora of legal decisions on the current Section 46. The result of those decisions is to leave a business that knows that it is plagued by an unfair competitive process and therefore does not have any alternative but to fold. This raises the question as to why we should leave the law as it is and allow this lack of ability to challenge a powerful competitor to persist? The proposed amendments to S.46 which include the removal of the 'take advantage' limb and introduce an effects test are not new proposals, they have been debated in Senate enquiries on numerous occasions and they have been in existence in other jurisdictions around the world for years, which makes the proposals for reform a high priority if we are to provide for a more prosperous economy and a fairer competitive environment.

Take Advantage

Questions 3/4/5

Question 3. Would removing the 'take advantage' limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?

21. MGA agrees with the proposal by the Harper Review to remove the words 'take advantage' from the current Section 46 in order to restrict behaviour that could otherwise be damaging to competitive process and the Australian economy.
22. Currently for a prosecution to succeed where a firm has allegedly taken advantage of its market power there needs to be a causal connection between the market power of the firm and the particular conduct. However, proving that the firm with market power has actually used that market power to the detriment of the firm that is without market power is difficult and has been the subject of much scrutiny by the Courts. There have been

numerous examples of exclusionary behaviour including predatory pricing and land banking in the supermarket retail, liquor and hardware industries that have clearly been used with the intention of excluding businesses from the market. Proving that a business “took advantage “of its market power to achieve that particular objective has been demonstrably problematic. The courts have concluded that if a firm with market power can perform what appears to be an aggressive act against its weaker rival and, on the face of it the aggrieved weaker firm was not prevented from taking the same action, then there is no assertion of ‘taking advantage’.

23. The case law⁵ that exists in relation to the use of the words ‘take advantage’ in S 46 were analysed in the Harper Review. The law does not make any distinction between the levels of market power of the competitors and the decisions have led to distortions in the market and demonstrates that there is a flaw in the current legal framework that needs to be remedied. It is inevitable that the larger businesses will just get bigger because they are legally not ‘taking advantage’ of their power but they are legally destroying the competitive process to the point that current competitors will be crowded out and new entry proponents will not be prepared to enter the market resulting in there being no competitors at all. Is this what Australia needs or wants?
24. Many of the decided cases have raised concerns in respect of how actions by businesses should be interpreted in the future. The case of ACCC v. Cement Australia⁶ particularly demonstrates the difficulties associated with the continued use of the words, ‘take advantage’ in the legislation. Although the Court found in that case that the Company had engaged in an anti- competitive conduct and had thereby lessened competition, it had not taken advantage of its market power.
25. The fear of change should be dissipated. If a firm is not misusing its power to eliminate the competition then there should not be any issue. It has never been suggested that simply because a business is bigger and better than its competitors, that it should be castigated for exerting its initiative or entrepreneurship. Attempting to narrow ‘exclusionary conduct’ (*Question 4*) would present a challenge as it would be necessary to define types of behaviour and this could cause complications and only exacerbate interpretation of meaning. There does not appear to be any real economic benefit to be gained by ‘narrowing exclusionary conduct’ as this is likely to add to further uncertainty rather than overcoming a problem that has clearly existed for some considerable time.

⁵ Melway Publishing Pty Ltd v. BHP (1989) 167 CLR 177; Boral Besser masonry ltd v. R Hicks (2003) 215 CLR 374; Rural Press Ltd v. ACCC(2003) HCA 75; ACCC v. Cement Australia (2013 FCA 909. (Competition Policy Review Final Report March 2015 pages 337-338)

⁶ Supra page 6 (2013 FC 909)

⁷ Duke A “The need to close the “Take Advantage’ gap in the regulation of unilateral anti-competitive conduct”[2008]U MelbLRS6 (updated 2009) http://www.austlii.edu/au/journals/U_Melb_LRS/2008/6

26. It has been argued that the removal of the words ‘take advantage’ will alleviate a great deal of the problems that have pervaded the decisions of the Courts in relation to S. 46. Although the current interpretation of the words ‘take advantage’ in Section 46(1) is a correct one, it is submitted they are not suited to the economy of the 21st century and reinforces the view that the section is today not fit for purpose. A. Duke, in his paper, “The need to close the “Take Advantage’ gap in the regulation of unilateral anti-competitive conduct”⁷ referred to the Trade Practices Revision Bill 1986 Explanatory Memorandum which he said, “lends further support to the argument that the High Court’s narrow interpretation of the phrase is mandated by the legislative wording:

“The corporation having the requisite degree of market power is not prohibited from engaging in any conduct directed to one or other of the objectives set out in paras 46(1(a), (b) or (c). Such a prohibition would unduly inhibit competitive activity in the market place..... The term take advantage in this context indicates that the corporation is able by reason of its market power to engage more readily and effectively in conduct directed to one or other of the objectives in paragraphs (a) (b) and (c). It is able, by reason of its market power, to engage in that conduct. Its market power gives it leverage which it is able to exploit and this power is deployed so as to ‘take advantage’ of the relative weaknesses of other participants or potential participants in the market”⁸ The inclusion of the words ‘take advantage’ in the Act and the interpretation that has been given to them in the decisions before the High Court indicate, as reinforced by Duke⁹ that the lawmakers were fully aware of the limitation that these words would make in any interpretation of section 46”.

27. MGA submits that the ‘take advantage’ limb of Section 46 is not fit for purpose and should be removed as it is unsuited to the changed economic environment in Australia .

28. The retention of the words “take advantage” will continue to lack clarity into the future unless there is change. If the “take advantage” limb is removed it would more readily open up the opportunity for a small business without market power to challenge a business that is allegedly misusing its market power for example, where a large firm engages in deliberate predatory pricing with the intention of squeezing its competitor out of the market. The smaller firm would not have to prove that the firm was taking advantage of its power but that the firm has used a substantial degree of power to achieve its objective and is therefore lessening competition.

29. Searching for a middle road by importing alternative words into s. 46 to restrict what is described as ‘economically damaging behaviour’ is better achieved by simply taking the step of removing the phrase ‘take advantage’ in the best interests of clarity. All businesses would benefit because contrary to the view that this

⁸ Explanatory Memorandum Trade Practices Revision Bill 1986 (Cth13)

⁹ Supra reference 7

amendment will ‘chill competition’ it is more likely to diminish ambiguity and focus more effectively on potential exclusionary anti- competitive conduct.

30. It is acknowledged that the Parliament previously saw fit to amend Section 46 by adding S 46(6A) which may be helpful but it is the submission of MGA that it would be advantageous to the competitive process to remove the ‘take advantage provision’ as it currently applies because its retention is not helpful in distinguishing genuine competitive conduct from exclusionary anti- competitive conduct.
31. Seeking out alternatives are likely to add to the complexities of the past and advancing with the removal of the words ‘take advantage’ would be far more progressive and beneficial to the competitive process.
32. There are many examples of the misuse of market power where the dominant power holder takes advantage by limiting a supplier’s ability to supply goods to a competitor or deliberately lowering the price of goods with the intention of putting the opposition out of business. These actions amount to taking advantage of holding a powerful position in the market but the current law is not able to prevent such actions.

Purpose and/or effect

Questions 6/7

33. Generally the objectives of competition law are, inter alia, to ensure that a healthy competitive business environment exists in Australia and that it provides protection and benefits to consumers. Our competition laws need to be such that there is opportunity for fairness for all businesses and if our laws prove to be inadequate to allow for each business to grow, and survive, on its merits then adjustments need to be made to overcome any deficiencies that prevent business growth. The retention of the word ‘purpose’ in the proposed amended legislation is supported by MGA, subject to its being used with the words “would have or be likely to have the effect of substantially lessening competition in that or any other market.”

Question 6 as posed by Treasury asks, “whether the addition of the ‘effects’ test together with the ‘purpose test’ would better target behavior that causes significant consumer detriment?”

34. Under the Harper Review proposal an effects test will be directed at a company with market power, that acts in a manner that has the purpose or effect (or likely effect) of substantially lessening competition and this would alter the focus of the section to the avoidance of harm to the competitive process rather than individual competitors, The current focus of ‘purpose’ on the prevention of harm to a competitor is inconsistent with the objectives of the CCA and with international law. It is conceded that other countries have had the benefit of developing jurisprudence on this issue for many years. It has been argued that Australia will be commencing a new line of reasoning which will inevitably lead to many legal challenges and therefore a new body of

precedents will need to be established over a period of time. It is questionable that this justifies hesitancy. If the law in its current form is no longer suited to our economic climate then change is necessary and ‘challenges’ are the inevitable consequences of that change. In the USA and in the EU where exclusionary conduct by dominant companies that, on evidence is deemed subjective, is prohibited. The addition of the effects test will provide the ability to determine from the outcomes whether the activity engaged in by a powerful firm is such that the interests of consumers have been damaged and whether the effects demonstrate that competition has been lessened. Amendment to S. 46(1) will provide this opportunity.

35. Conduct such as anti-competitive price discrimination, ‘store saturation,’ or store cross subsidization would be easier to determine and prosecute, if the effects of the conduct are considered together with the purpose of what was intended. Purpose alone is open to conjecture and could be detrimental in determining intended consequences which may then lead to uncertainty. It would be beneficial therefore to include an effects test with the purpose test in order to enable a more conclusive decision is reached in determining whether conduct could be anti- competitive or not.
36. Many forms of anti- competitive conduct are, under the current law, allowed to continue because it is necessary to prove that the purpose of the anti- competitive conduct was specifically aimed at eliminating or damaging a competitor, such as preventing a competitor entering the market or deterring a competitor from engaging in competitive conduct. It is proving the ‘purpose’ behind the action that is the problem because it is difficult to know what was in the mind of the person exercising the actions in the first place. It would be much easier to prove the purpose if it is linked to the effect.
37. Due to the continued uncertainty that exists in section 46 it is essential that a change is implemented. The change is necessary to meet the economic needs of the future and to provide consumers with choices.

Question 7 “Whether retaining purpose test alone while amending other elements of the provision would be a sufficient test to achieve the objectives of the Harper Panel Review?”

38. The Harper Review made it quite clear that in its current form the ‘purpose test’ protects the individual competitor not the competitive process and it is the protection and promotion of the competitive process that should be the objective of the law. It is our submission that ‘purpose’ alone is insufficient. Proving that there is an intention of a firm to misuse its market power is problematic in that unless there is a consequence then the test will remain a subjective one.

39. The Harper Review rightly cited the comparisons in international law, particularly the USA and Canada,¹⁰ where it is shown in these jurisdictions that there is benefit in having a combination of the intent and the resultant effect, which can be inferred from the actions of a firm,. The purpose alone is an insufficient subjective test and is concerned more with motivation, which may also be influenced by further conduct, making the purpose a continuing one.
40. The restructure of S 46 would be more effective with the additional element of the effects test to lessen market power.

Substantially lessening competition

Question 8 “Given the understanding of the term ‘substantially lessening competition’ that has developed from case law, would this better focus the provision on conduct that is anti –competitive rather than using specific behavior and therefore avoid restricting genuinely pro-competitive conduct’?”

41. The Harper Review stated throughout the report that the main objective of any new laws should be the promotion and protection of competition, the main focus of which is on the competitive process.
42. There have been concerns raised that the proposed expansion of the substantially lessening of competition test in S. 46 will be a deterrent to those who plan to engage in pro competitive activities and this has raised fears that such activities will be stifled for fear of breaching the law. The Harper Review responded to these concerns when they were raised and it was pointed out that the “proposed test of ‘substantially lessening competition’ is the same as that found in sections 45, 47, and 50 and the test is well accepted within those sections. As explained by the former Trade Practices Tribunal in QCMA¹¹ “competition expresses itself as rivalrous market behavior and is a process rather than a situation.”
43. A business would of necessity need to assess whether any proposed activities are likely to be anti- competitive or pro- competitive and determining the purpose and effect behind its actions should not be unduly burdensome. MGA submits that the comparisons that have been drawn between the proposed change to Section 46 and legislation in overseas jurisdictions provides strong evidence that giving consideration to the assessment of pro-competitive conduct as opposed to anti- competitive conduct is common and beneficial.
44. In the supermarket industry there have been suggestions that consumers are less likely to find large or many reductions in food prices because, by engaging in such an activity big businesses will fear that they may be breaching the law. The introduction of new laws will not prevent robust competition, such as in this example,

¹⁰ American Bar Association Draft Submission to the Harper Review page 13 and Competition Act, Canada Section 79.

¹¹ Queensland Cooperative Milling Association(1976) 8ALR481 at 515 and 516

or any other form of competition from happening. On the contrary the intention is to have all competitors examine the purpose of their competitive initiatives and to carefully consider the consequences of their actions and their impact on the competitive process generally. Any business that engages in improving, developing or innovating in order to promote a business may require its personnel to scrutinize their proposed actions but it is disputed that this would be a costly or time consuming exercise.

45. The proposed S.46(1) is likely to prevent anti- competitive conduct such as deterring entry into a saturated market or pricing goods at levels that will eventually force a competitor out of the market and then restoring them to a higher price once the elimination is complete.
46. Nevertheless, there remains a fear that procompetitive conduct could be overlooked if new laws are introduced. Any amendment to the Act to ensure that businesses are not being anti-competitive will not stifle innovation or new ideas but if there are concerns that such a situation existed then the assistance of the ACCC should be available where there is doubt. The availability of authorisations by the ACCC may assist in overcoming any concerns that might exist and is suggested that S46 should provide this opportunity.
47. It is surely in the public interest to ensure that the law is compatible with the growth of the changed business environment in which the emergence of thousands of small businesses have changed the economic landscape and are able to contribute to Australian economic growth. Unfortunately our laws are inhibiting diversity in the economy and our laws need to focus more on preventing the anti- competitive exclusionary behavior of the past. Adopting the recommendations of the Harper Review is an opportunity to achieve the elimination of anti-competitive exclusionary behavior and encourage businesses to examine their pro- competitive behavior closely.
48. MGA does not oppose any activities that genuinely benefit the competitive process. However, the ‘substantially lessening of competition test’ should be able to determine a pro- competitive activity from an anti- competitive activity. The proposed legislative guidance recommended by the Harper Review in S 46(2) was obviously aimed at overcoming this concern. However, such an amendment could have the effect of raising issues of interpretation and therefore MGA supports guidance by the ACCC Regulator could be more effective and result in fewer delays that could result from a more litigious process.

Question 11 Would establishing mandatory factors the courts must consider reduce uncertainty for business?

and Question 12 if adopted what should they be?

49. After consideration of submissions on the issue of providing for defence provisions in Section 46 it was decided to recommend the inclusion of mandatory court guidance. The Harper Panel considered a number of submissions in reaching this decision and felt that the adoption of the legislative guidance would be beneficial, similar to arrangements in other sections of the Act and in other jurisdictions.
50. The proposed recommendation does provide specific parameters which the courts must take into consideration when determining whether conduct that has a purpose or would have be likely to have the effect of substantially lessening competition. Such provisions that provide for an understanding of whether there is a decrease or increase in efficiency, innovation, product quality or price competitiveness do on face value appear to be preferable to the defenses that were previously proposed. They also appear to be consistent with overseas authorities. However, this guidance may cause difficulties in prosecuting or defending this section before a Court. Attempting to prove or disprove any of the listed mandated guidelines (which is a non – exhaustive list) could have negative results as this has the potential to be restrictive and become a distraction rather than a useful guide. It is unclear whether directing the Court to assess specific evidence would be a useful tool. Whilst there may be merit in providing guidelines at the judicial level it could lead to issues of interpretation which can lead to protracted litigation.

Authorizations

51. ***Question 13 “Should authorization be available for conduct that might otherwise be captured by S. 46?”***

MGA supports the inclusion of supplementary measures including ACCC authorizations on the grounds that if it can be demonstrated to the satisfaction of the ACCC that it is in the best interests of the public to permit a particular activity to proceed. Authorizations would allow for clarification before adopting a particular position and reduce uncertainty. This process has been successfully used for other areas of the legislation and the adoption of this process would assist in avoiding expensive litigation.

D. Specific Options

Option A

Retain S.46 in its current form (no amendment)

52. MGA opposes the retention of Section 46 in its current form. MGA is strongly of the opinion that currently Section 46 of the CCA is deficient.

53. The current law disallows a company that has a substantial degree of market power from “taking advantage” of its power if it has as its purpose the elimination of damaging a competitor. The intention behind the wording of the section is to protect competition but the results of decisions in recent years have shown that the wording is demonstrably flawed and unsuited to the current economic environment.
54. The argument has been successfully made that if a firm without market power could take the same action as a firm with market power then there is no breach of the law. On the face of it the section affords protection to all businesses however, the reality is that there is often a nexus between the exercise of market power and anti – competitive conduct but, due to the framing of the current Section 46(1) proving that nexus exists has been impossible because the law is clearly intended to be interpreted otherwise
55. The content of the current S 46 has been scrutinized and reasons have been presented as to why it should remain unchanged. There is a strong school of thought that it should be retained in its current form because if it is changed then it will damage innovation in the market and big businesses will be skeptical and nervous about initiating new competitive measures..
56. Larger businesses have strongly promulgated their case and believe the change with ‘çhill competition’. There has certainly been consideration given to proposed changes to Section 46 in the past, notably the Dawson Review in 1993 and the Hilmer Review in 2003, but none of the discussed amendments were implemented. Consequently, there is today a greater demand for reform as smaller businesses have become more highly concentrated in wider areas of the economy and are now able to voice stronger views about the need for change that will provide them with greater clarity and certainty into the future. There is therefore a strong voice for the reform of Section 46 which includes the removal of the words ‘take advantage’ that would overcome the continued potential for market distortion.
57. There is also a need to review the use of the word purpose in Section 46(1) because it is only concerned with competitors and not the competitive process.
58. MGA strongly supports the inclusion of the effects test in Section 46 which would make it easier to determine whether market power has been misused. The need to include an effects test would bring the section into line with other international jurisdictions which have similar prohibitions. The Sherman Act in the USA supports an objective intent based on conduct and effect. In Canada there is a focus on conduct that has the effect or likely effect of substantially lessening competition and many European jurisdictions have moved towards a focus on how certain conduct of businesses can have an adverse effect on competition thereby damaging the competitive process.

59. Section 46 is no longer fit for purpose and the Harper Review proposal that Section 46 should prohibit conduct that has purpose or likely effect of substantially lessening competition in the marketplace. Is strongly supported by MGA

Option B. Remove the words ‘take advantage’

60. MGA supports the removal of the words, ‘take advantage’ but its removal must be in conjunction with other amendments to Section 46 in respect of ‘purpose’ and the inclusion of an effects test. MGA does not support an option that consists solely of the removal of the words, ‘take advantage.’
61. The words ‘take advantage’ in S 46 has been described as “the filter for distinguishing between pro-competitive conduct and anti- competitive conduct”¹² but it is not a useful filter. The words have given rise to interpretative problems and confusing outcomes. The decisions on the use of the words, ‘take advantage’ are problematic. It is difficult to reconcile why a company with market power can engage in unilateral anti-competitive conduct but is untouchable by the law because of the inability to prove that the company’s actions were the outcome of its market power. As has previously been stated if a business that has market power engages in an anti- competitive purpose and has thereby lessened competition, it has been concluded that the company may not necessarily taken advantage of its market power. Furthermore, if a company that does not have market power could have acted in the same way as the one with market power then there is no breach of section 46. While MGA supports the removal of these words it is submitted that their removal from S 46 should be accompanied by other proposed amendments to the section as prescribed by the Harper Review.
62. In its review the Panel rightly points out that the use of the words, “take advantage” in section 46 have caused considerable difficulties of interpretation, in particular the decisions in various cases have resulted in making it difficult to distinguish between anti- competitive and pro- competitive conduct. The lack of clarity and uncertainty surrounding the retention of the phrase , “take advantage“ has therefore influenced the Panel to conclude it is not a useful test within section 46 and should be removed.
63. The Courts have grappled with the interpretation of the words, ”take advantage” and the difficulties that have arisen with the continuance of these words in the section is evident. In the Melway case¹³ the High Court stated that, “it may be proper to conclude that a firm is taking advantage of market power where it does something

¹² . Mr. Rod Sims- “Bringing more economic perspectives to competition policy and law”-Speech to the RBB Economics conference Sydney 7 November 2014

¹³ Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd(2001) 205 CLR 1at 51

that is materially facilitated by the exercise of the power even though it might not have been absolutely impossible without the market power.”

64. Subsequent to the decision in *Rural Press Limited v. ACCC*¹⁴, Section 46 was amended in an attempt to clarify the meaning of “taking advantage.” Despite the addition of subsection 6(a) to Section 46 in the Competition and Consumer Act, difficulties of interpretation with the words “take advantage” continued to prevail. Again in *Rural Press and ACCC v. Cement Australia*¹⁵ the Courts faced problems of interpretation in respect of the “take advantage” phrase. It is not the outcomes of these cases that is important but the degree of confusion and uncertainty that has been created by the retention of the words, “take advantage.” The confusion and lack of certainty as a result of retaining the phrase in the legislation, justifiably persuaded the Panel to conclude that the test has had the effect of, “undermining confidence in the effectiveness of the law.”¹⁶
65. The most appropriate course of action in the interests of promoting the competitive process therefore is to remove the disadvantage test from section 46.

Option C Remove the words ‘take advantage, include a substantially lessening of competition test , make authorizations available and ACCC guidelines regarding the approach to the provision.

66. MGA does not support Option C as its preferred option.
67. As referred to above MGA supports the removal of the words ‘take advantage’ as this would remove the link between exercising market power and the potential to engage in anti- competitive practices. A ‘substantially lessening of competition test’ requires a determination of what actions, reasons or circumstances might cause such a result. In the opinion of MGA including the purpose and effects test assists in measuring of the SLC test. The inclusion of authorizations would assist in the provision of compliance guidelines as to how the lessening of competition might or might not occur and providing guidelines could also be of assistance. However, without the effects test and the inclusion of purpose, the section would not go far enough to assist small business. MGA does not support this option as it is too limiting in its content.

Option D Remove the words ‘take advantage’ include purpose of substantially lessening competition test , including mandatory factors, make authorizations available and the ACCC issuing guidelines regarding its approach to the provision.

68. MGA does not support Option D as a preferred option.

¹⁴ *Rural Press Limited v. ACCC* (2003) HCA 75

¹⁵ *ACCC v. Cement Australia* (2013) FCA 909

69. MGA does support the removal of the words, 'take advantage'. We support the inclusion of the SLC test, the effects test and authorizations and ACCC guidelines. We do not support the mandatory factors as proposed by the Harper Review.

70. As referred to above MGA supports the removal of the words 'take advantage' as this would remove the link between exercising market power and the potential to engage in anti-competitive practices. MGA is of the opinion that the 'substantially lessening of competition test' which requires a determination of what actions, reasons or circumstances might cause such a result. The inclusion of the purpose and effects test is essential to the measuring of the SLC test and MGA does not support an option that does not include these proposals. MGA does not support the inclusion of the mandatory factors as proposed by the Harper Review Panel as these are likely to be burdensome due to the many factors that might could impact a particular situation and which could become difficult to prove or disprove. If the legislation is amended as proposed by the Harper Review Panel then they would not be necessary.

Option E Remove the words 'take advantage' include a purpose, effect or likely effect of substantially lessening of competition, make authorization available and ACCC guidelines available regarding its approach to the provision.

71. MGA supports the adoption of Option E and that Section 46(1) would be amended to

"prohibit a corporation that has a substantial degree of power in a market from engaging in conduct, if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market".

72. There have been copious arguments forwarded, and numerous articles written by MGA and others as to why the Government should accept the recommendations of the Harper Review Panel in respect of amendments to S. 46. It is not the intention of MGA in this paper to reiterate in great detail the reasons why we strongly believe that the adoption of changes to Section 46(1) as proposed by the Harper Review is the appropriate course to follow.

73. However, the summary of reasons why MGA strongly supports the Harper Panel recommendations for Section 46(1) include that:

The economic landscape in Australia has changed over recent years. When the law in its current form was drafted the business landscape was far different from today. Big businesses in the retail supermarket, liquor and hardware industry have grown to enormous proportions and small businesses have grown in their thousands, to the point where changes are necessary to competition laws so as to provide for a more equitable, competitive

environment. The law as it stands today is in need of reform. MGA strongly supports the three major areas of change to Section 46 of the CCA. Firstly, MGA supports the removal of the words, 'take advantage,' secondly, changing the direction of the word 'purpose' to focus on the avoidance of harm to the competitive process together with the inclusion of the words 'effect or likely effect' and thirdly the link between the use of these words and a 'substantially lessening competition test.'

74. The removal of 'take advantage' will alleviate a great deal of the uncertainty and the subsequent problems that have pervaded the decisions of the Courts in relation to S. 46. It is clear that the reason big businesses are complaining about the removal of the word 'take advantage' from Section 46(1) is because they are bigger and stronger than their weaker smaller rivals. As Professor Stephen Corones stated in his submission to the Harper Review, "...conduct engaged in by a firm with substantial market power will have a much greater propensity to have market – distorting foreclosure effects, than the same conduct engaged in by a firm without substantial market power. The need to examine the conduct of major business more closely than those without market power has been recognized in both the United States and the EU".¹⁷
75. There is a need for the use of the word 'purpose' as discussed in the Harper Review to be focused on the competitive process rather than the way it is currently presented in the legislation, which refers specifically to individual competitors. As has been discussed in other areas this would direct the focus of the section on the competitive process and away from 'competitors' and be more in line with international standards.
76. The effects test must be included as an essential component of the proposed amendment to the CCA. We are in need of law that will protect against anti-competitive practices. If a company engages in exclusionary conduct, such as land banking, and because they have the financial ability they are able to leave the land dormant then a small business can suffer seriously damaging consequences. This is undoubtedly an exertion of a firm's market power and if it has the effect of substantially lessening competition then under the proposed Harper amendments it will be prohibited. Surely this will provide for a healthier competitive environment. If a business engages in conduct that has the likely effect of substantially lessening competition then the ACCC should be able to examine the activity to examine the purpose of the action determine the likely effect. If this is unlikely to happen then the issue of an authorization would assist in averting the consequences.
77. MGA does not support the inclusion of the mandatory factors as proposed by the Harper Review Panel as these are likely to be burdensome due to the many factors that might could impact a particular situation and which could become difficult to prove or disprove. MGA submits that the inclusion of mandatory factors runs the risk

¹⁷ "Professor S Corones, Professor of Law Queensland University of Technology. Submission to the Harper Panel Review 8 October 2014 page 11, para 37.

of causing delays and problems for the courts when the issues could be detected at the regulatory level rather than the litigious level. However, MGA does support the availability of authorizations and the availability of guidance from the ACCC for inclusion in Section 46. MGA is of the opinion that access to such advice and guidance would be helpful in directing a business as to a proper course of action and would assist in avoiding litigation.

78. The abuse of market power by larger businesses must be stopped and an amended section 46 is in the best interests of public policy. Consumers will benefit from improvements in competition where large and small industries can benefit for the common good. The use of authorizations by the ACCC would provide a valuable tool for businesses where a proposed arrangement might appear to be anti-competitive but on examination by the ACCC if it provides a public benefit then the weight of the ACCC could be useful.

Option F- Adopt the full set of changes recommended by the Harper Panel?

79. MGA prefers the adoption of Option E rather than Option F

80. MGA supports amendments to Section 46(1). We are particularly of the opinion that to avoid any uncertainty that might emanate from the inclusion of mandatory factors that the Courts would need to take into account when making a decision, could lead to protracted litigation and to avoid consequent cost and delay it is proposed that the mandatory factors be omitted. MGA does support the adoption of assistance from the ACCC as referred to in our support for Option E.

E Conclusion

The independent retail sector is fully aware that healthy and robust competition is a vital part of delivering excellent consumer outcomes. However, we have now reached the stage that in order to deliver the competition that consumers deserve we need laws that are fit for the purpose. The imbalance in the competitive process has led us to the point that fairness is being eliminated from competition in Australia.

Amending the law will not destroy competition, it will enhance competition. What is there to be afraid of by changing the law? There is ample evidence of exclusionary behavior such as anti-discrimination price discrimination, land banking and bundling from which it must be concluded that the CCA laws need to be amended.

MGA members are very clear in their opinions, they respect the competitive spirit of those who engage in fair play and they admire any business that succeeds in a difficult and demanding business environment. There will always be those businesses at any level that will do better than others due to their particular brand of business acumen and

their creativity. This is to be encouraged and they deserve to succeed. However, if all the players operate on a level playing field then each competitor has a chance of success, no matter what the level of achievement.

The Harper Review has delivered excellent recommendations for a range of changes to competition law but obviously none with greater significance for the independent grocery, liquor and hardware sector than Section 46. It is hoped that any amendments to the CCA that emerge, following this inquiry by Treasury, will provide an equal competitive opportunity for all businesses, large and small, and that the competitive process, which has been so strongly promoted by the Harper Review, consisting of an eminently qualified panel, will provide the opportunities for all parties to achieve success in the Australian economy on their merit, and not just on their power.

We thank the Minister and Treasury again for the opportunity to respond to the “Options to strengthen the misuse of market power law.”



Jos de Bruin

CEO MGA Independent Retailers

12th February 2016.